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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1675

THE NORTH CAROLINA UTILITIES COMMISSION,
SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM J. BROWN
Attorney General of Ohio
MARVIN I. RESNIK
Assistant Attorney General
Chief, Public Utilities Section
CHERYL K. HACHMAN
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
ATTORNEYS FOR *AMICUS CURIAE*
The Public Utilities Commission of Ohio

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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OPINIONS BELOW

Now comes the Public Utilities Commission of Ohio (hereinafter referred to as PUCO) by its counsel, William J. Brown, Attorney General of Ohio, in support of the Petition of the North Carolina Utilities Commission and the Southeastern Association of Regulatory Utility Commissioners (hereinafter referred to as Petitioners) requesting this Court to issue a writ

of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *North Carolina Utilities Commission v. Federal Communications Commission*, — F 2d — (4th Cir. 1977), which has not yet been officially reported. This *amicus curiae* brief in support of the petition is filed pursuant to U.S. Sup. Ct. Rule 42, 28 U.S.C., requiring prompt filing prior to the consideration of the petition.

INTEREST OF THE *AMICUS CURIAE*

In 1911 the General Assembly of the State of Ohio delegated to the PUCO the responsibility, *inter alia*, to regulate both the price at which telecommunication services and equipment may be offered within the State of Ohio, and the terms and conditions under which such services and equipment can be offered. The statutory framework of regulation of the provision of the telecommunication network in the State of Ohio is based upon three fundamental decisions by the Ohio General Assembly. First, that each company engaged in the business of transmitting telephonic messages in the State of Ohio have a defined service area in which it may operate (Section 4905.24, Ohio Revised Code, 1954); secondly, there would be no competition between such companies (Section 4905.24, Ohio Revised Code, 1954); and, finally, that these companies be required by law to furnish adequate facilities and services at reasonable rates (Section 4905.22, Ohio Revised Code, 1954). Thus, the State of Ohio, in exchange for allowing such companies to operate as monopolies has required them to assume certain responsibilities and duties. It is the responsibility of the PUCO to assure that these utilities meet their responsibilities. The general purpose of this statutory framework is obvious: to promote the provision of a reliable telecommunications service which is physically and economically available to all the citizens of the state. The means by which this is to be accomplished is by regulation and supervision of companies who are responsible to the state for carrying out this policy.

The order of the Federal Communications Commission (hereinafter FCC) establishing a massive new Federal registration program for the provision of terminal equipment which is used predominantly for, or in connection with, local and intrastate communication service, would impair, if not destroy, the ability of the State of Ohio to assure that its citizens will continue to enjoy adequate telephone service at reasonable rates. Traditionally, the provision of terminal telephone equipment has been considered an integral part of adequate telephone service on the local level. Hence, traditionally those who have provided such equipment have had, in Ohio, the legal responsibility not only to provide this equipment but to provide adequate equipment. Not only does the FCC's decision to allow companies, who are not subject to regulation in the State of Ohio but who have met the FCC's registration requirements, to provide an integral part of the provision of intrastate service impair the state's ability to supervise and control the quality of service its citizens will receive, but it will also inevitably impair, if not destroy, the ability of the state to pursue its rate making policies. For these reasons the PUCO strongly supports the petitioners.

STATEMENT OF THE CASE

Petitioners seek review of the decision of the Fourth Circuit Court of Appeals affirming orders of the FCC

instituting a Federal registration program for all types (with minor exceptions) of terminal equipment to be interconnected with local telephone exchange equipment. This registration program will effectively take the place of state regulation and control of the terminal facilities used in the provision of intrastate service and may have serious adverse impact upon the revenues and rates of the various telephone operation companies throughout the nation. The history of the proceedings before the FCC leading to this new Federal intrusion upon matters which are clearly of local concern as well as the history and general principles of the supervision and control of these local concerns by the states has been set forth extensively by petitioners in their Statement of the Case. While the PUCO agrees with that discussion there is one point which the PUCO would emphasize. This is, that the provision of telephone service and the terms, conditions and rates under which that service will be provided, will, because of the inherent nature of the telecommunications network in the country, vary from state to state.

There are 51 telephone companies operating in the State of Ohio. These companies include not for profit, or mutual companies, range in size from the North Creek Mutual Telephone Company with 123 main stations to the Ohio Bell Telephone Company with 2.4 million main stations, and provide service under widely varying geographical conditions with differing customer mixes. The PUCO regulates all of these companies. While the PUCO's general policy is to promote the provision of service to all citizens at an economically attractive price, it must nevertheless recognize that what may be a viable policy to enforce with respect to

the Ohio Bell Telephone Company, may destroy the economic viability of a small telephone company.

Traditionally, the PUCO has supervised the quality of the service and facilities furnished by telephone companies and fixed rates for those services. The intrastate supervision of the quality of local service and facilities necessarily, except for limited kinds of service, defines the quality of interstate service. This is true because of the obvious and inescapable fact that almost all telephonic messages whether interstate or intrastate are initially conveyed through local facilities. Thus, the quality of the telephone network in the nation depends and will always depend, in large part, upon the ability of local authorities to effectively respond to local problems.

In addition to supervising the quality of the telephone network in the State of Ohio, the PUCO is also responsible for fixing the rates charged by the telephone operating companies for the various kinds of services and facilities they provide. As the characteristics of the telephone companies and their consumers vary widely in the State of Ohio, generalizations about the rate making policies of the PUCO are somewhat dangerous. However, the PUCO has traditionally and almost uniformly applied what is referred to as the "value of the service method" when fixing fair and reasonable rates for telephone companies. Simply put, this means that the rates are not based upon the cost of providing particular kinds of services or facilities but on an assessment of what rate will attract universal acceptance of the service. This, of course, means that the rates for some services or facilities will be higher than their costs while other rates will be below the cost. In other words,

the PUCO has fostered some amount of subsidization of certain consumers by others. The purpose of such a policy has been to encourage acceptance of the telephone, particularly by residential consumers. Such a policy not only accrues to the benefit of residential customers but to other customers as well, since the number of people they can call, or who can call them increases, which thereby increases the value of their telephone service.

While the extent of subsidization among classes of subscribers using various kinds of facilities and services is often the subject of a great deal of debate during rate cases at the PUCO there is one fact that is clear: the provision of adequate service depends to a large extent on the charge for that service. The almost universal acceptance of telephone service in every home is a relatively recent phenomenon, which the PUCO believes, has occurred in large part because the installation charges and monthly rates for residential service have, by design, been very reasonably priced. It has been the experience of the PUCO that the rates for telephone service and facilities and the quality of that service are inextricably intertwined.

Both the FCC and the Fourth Circuit Court of Appeals have failed to address and, we submit, really comprehend the potential impact of the Federal registration program for terminal equipment on the public. While the FCC has, through its registration program, attempted to resolve the problem of damage to the telephone network by the connection of inferior customer owned equipment this is only one aspect of all of the considerations which, assuming the FCC has the jurisdiction to control the provision of local facilities,

the FCC should have evaluated before establishing such a program. The FCC failed to assess or even recognize the adverse effects its registration program will have on the quality of and rates for intrastate service which is, as was pointed out by Petitioners, 97% of the service provided by telephone companies. Not only does the FCC's registration program represent a clear intrusion into matters which have and should continue to be dealt with by the state, but it embarked upon this program without giving consideration to the impact of its new policies upon local subscribers and upon the ability of local governments to meet their responsibility for assuring adequate service and facilities at reasonable rates.

REASONS FOR GRANTING THE WRIT

The FCC's orders instituting a Federal registration program for the interconnection of customer provided terminal equipment clearly exceed the jurisdiction conferred upon the FCC and preempts jurisdiction over intrastate service, facilities and rates which was specifically reserved to the states. Section 2(B) of the Communications Act of 1934 clearly provides that the jurisdiction of the FCC cannot be extended to "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier" 47 U.S.C. Section 152(B). As it is an uncontrovertible fact that intrastate service and facilities are, and have always been, used for the provision of the vast majority of interstate service it would seem clear this language reserves to the state jurisdiction over facilities which are used for both intrastate and interstate commerce. That

this is indeed the meaning of the language is, as petitioners have pointed out, conclusively demonstrated by the legislative history of the Act. Such a reservation of power to the states is also dictated by common sense.

The users of telephonic equipment on the state level have basically three interests: first, that the equipment which meets their needs for service can be obtained; secondly, that the equipment that is provided works; and finally, that the equipment and the total service is provided at a reasonable price. It has been the settled policy to entrust the protection of these interests to those who are most closely attuned to the telephone subscribers and the companies who provide telephone service, that is, the states. Thus, if a customer cannot obtain service or facilities, if his service or facilities malfunction, or if he believes the rates for the service and facilities are excessive, he can relatively easily seek assistance from a state agency such as the PUCO.

This Court has recognized the connection between the type of problems with which government must deal and the decision of which level of government has been assigned the responsibility of resolving those problems. In *Palmer v. Massachusetts*, 308 U.S. 79 (1939), this Court was presented with a decision by a District Court that the powers conferred upon the District Court by the Federal Bankruptcy Act over insolvent railroads included the power to authorize a railroad undergoing reorganization proceedings before the court to abandon certain intrastate rail service which was unprofitable. While the interests of the District Court in assuring a viable reorganization of an insolvent interstate railroad were clear, the Court of Appeals for the Second Circuit reversed the District Court's order authorizing

abandonment of intrastate service. In the decision on the subsequent appeal to the United States Supreme Court Justice Frankfurter, writing for the majority aptly stated the problem facing the Court:

> "Plainly enough the District Court has no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.
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> "To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. [citations omitted]" 303 U. S. 79, 89

In analyzing whether Congress had in fact given the District Court power to deal with a matter in the keeping of state authorities, the majority stated:

> "The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states. . . . If this old and familiar power of the state was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change." 308 U.S. 79, 84-85.

The language set forth above was cited and followed by this Court as recently as 1971 in its decision in *United States v. Bass*, 404 U.S. 366 (1971).

We submit that this analysis should have been used by the Fourth Circuit Court of Appeals when reviewing the orders of the FCC establishing a Federal registration program for the connection of customer provided telephone terminal equipment and that if it had, the FCC's orders would have been reversed. The dependence of local consumers on local telephone facilities and services has for half a century placed control over the terms, conditions, and rates under which that service will be provided, within the regulatory authorities of the states. If this old and familiar power of the states was withdrawn when Congress gave the FCC powers over the provision of interstate telephone service, there ought to be language fitting for so drastic a change. In fact the language of the Federal Communications Act indicates that Congress, recognizing the dependence of local subscribers on local control of telephone facilities and rates, intended to preserve the then existing balance between Federal and state governments.

However, if it is assumed that the intent of Congress was other than what the plain language of Section 2(B) of the Communications Act of 1934 indicates, and that the FCC has and has always had the authority to assert control over facilities used in the provision of intrastate commerce, then the question becomes whether the FCC has exercised its authority in a reasonable and proper manner. The touchstone of FCC action must be the public interest and not mere enhancement of competition. *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86 at 97 (1953). While the question of protection of the telephone network from harm by the provision of customer provided equipment is, of course, a necessary part of the decision that the equipment can be provided by a customer rather than a telephone company, this is clearly, as the FCC has recognized, only one of the considerations which must be addressed if the FCC can purport to act in the public interest.

While there are a number of potential problems raised by the FCC's assertion of jurisdiction over local facilities, the obvious one is the potential economic impact upon the telephone companies and their subscribers. The FCC failed to analyze the economic impact on interstate service let alone intrastate service prior to its decision to implement the registration program. The Court below, apparently recognizing the significance of this issue, supplied its own analysis. This analysis was, apparently that the economic impact would be slight since the "*registration program* could hardly be expected to cause a substitution effect". Petitioners' App. 32a (Emphasis in original). Thus, the basis for decision of the Court below was the peculiar rationale that the competition the registration program

was designed to allow and promote would be unsuccessful.

The State of Ohio cannot view the situation so blithely. The potential adverse economic impact upon the telephone companies is real. The potential impact upon the state's rate making policies is real. The potential impact upon the state's authority to assure that telephone subscribers are receiving adequate facilities that will be properly maintained is real. There can be no doubt that the FCC registration program represents a major change in the provision of telephonic equipment and that it will emasculate the state's ability to control not only the facilities which are provided to subscribers, but the state's ability to continue to pursue its present rate making policies. Surely if such a substantial and far reaching change can be made under the Communications Act of 1934, the problems posed by such a change demand a reasoned approach. Such an approach has been entirely lacking in the decisions of the FCC and the Court below.

CONCLUSION

Amicus curiae PUCO supports the petitions for a writ of certiorari of the judgment of the Fourth Circuit Court of Appeals in the consolidated case below and respectfully urges this Court to grant such Petitions.

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CHERYL K. HACHMAN
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
(614) 466-4395

ATTORNEYS FOR *AMICUS CURIAE*
The Public Utilities Commission of Ohio

APPENDIX

Statutory provisions referred to herein which are not set forth in the Appendices of the Petitioners.

§4905.22 Service and facilities required; unreasonable charge prohibited. (GC §§ 614-12, 614-13)

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

§4905.24 Company not permitted to exercise right of franchise where another is giving adequate service. (GC § 614-52)

No telephone company shall exercise any permit, right, license, or franchise that was granted prior to June 30, 1911, but was not actually exercised, or granted after such date, to own or operate a plant for the furnishing of any telephone service, in any municipal corporation or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate, after public hearing of all parties interested, that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience.

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